# Nos. 15,450 and 15,680

IN THE

# United States Court of Appeals

## For the Ninth Circuit

WILLIAM R. RUSSELL,
*Appellant,*

vs.

WILLIAM CUNNINGHAM,
*Appellee.*

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WILLIAM R. RUSSELL and ANNA L. RUSSELL,
*Appellants,*

vs.

UNITED STATES OF AMERICA, et al.,
*Appellees.*

**On Appeals from the District Court of Guam (No. 15,450) and the United States District Court for the Northern District of California (No. 15,680)**

## BRIEF FOR APPELLEES

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## BRIEF FOR APPELLEES

### PRELIMINARY STATEMENT

By Order, dated October 16, 1957, in No. 15,680, the Court directed that both appeals captioned above be heard together. The Appellants have filed a single consolidated brief in both cases and the Court, by an Order filed October 7, 1959, captioned in both cases, provided for the filing by the Appellees of "their answering brief". Accordingly, to avoid confusion and

with a view to presenting in a single document a comprehensive view of this litigation, Appellees submit a consolidated brief upon the two cases, which concern the same subject matter.

The affirmance of the judgment below, on a previous appeal in the Guam action (No. 15,450), is reported in *Russell v. Cunningham,* 233 F.2d 806 (9th Cir. 1956). The dismissal of an appeal in a related case, referred to herein, is reported in *Russell v. Hackworth, et al.,* 233 F.2d 503 (9th Cir. 1956).

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## JURISDICTION

**No. 15,450—The Guam Appeal**

This is an appeal by Plaintiff-Appellant William R. Russell from an order of the District Court of Guam (Guam R. p. 158) denying a motion to set aside a judgment of dismissal for lack of prosecution.

The jurisdiction of the District Court of Guam was founded upon the Act of August 1, 1950, c. 512, §22, 64 Stat. 389 (as amended, 48 U.S.C. §1424) by virtue of a Complaint (Guam R. p. 1) filed April 26, 1954.

The jurisdiction of this Court is invoked under 28 U.S.C. §1291 by a defective Notice of Appeal (Guam R. p. 158), filed November 21, 1956, from the Order (Guam R. p. 158), filed October 26, 1956, denying a motion to set aside a previous judgment of dismissal. This Court is actually without jurisdiction, since the order appealed from is a non-appealable order.[1]

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[1] *Hicks v. Bekins Moving & Storage Co.,* 115 F.2d 406 (9th Cir. 1940).

**No. 15,680—The California Appeal**

This is an appeal by Plaintiffs-Appellants William R. Russell and Anna L. Russell, his wife, from a judgment (Order of Dismissal, Cal. R. V. 1, p. 22) dismissing the Complaint and cause below.

The court below had no jurisdiction against Defendant United States for lack of consent of the United States to be sued.[2] If the court below had jurisdiction as to the remaining defendants, such jurisdiction must have been founded upon 28 U.S.C. §1331, by virtue of a Complaint (Cal. R. V. 1, p. 1), filed April 11, 1955, impliedly calling in question the exclusiveness of the Plaintiffs' remedy under the Federal Employees Compensation Act of September 7, 1916, c. 458, 39 Stat. 742 (as amended, 5 U.S.C. §751, *et seq.)*, the principal point to be discussed in this brief.[3]

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[2]28 U.S.C. §2680(h) and Federal Employees Compensation Act of September 7, 1916, c. 458, 39 Stat. 742 (as amended, 5 U.S.C. §751, *et seq.*).

[3]Although Appellants attempt to invoke diversity jurisdiction, they do no more than allege that they "reside" in California and that each Defendant is a "resident" of another state or territory. It has been a settled point from *Bingham v. Cabot,* 3 Dall. 382 (1798) to the present day that mere allegations of residence are not enough to confer jurisdiction upon the court. Moreover, Appellants have joined as defendants no less than 60 avowedly fictitious parties. This alone would be fatal to diversity jurisdiction. *Molnar v. National Broadcasting Company,* 231 F.2d 684 (9th Cir. 1956). Finally, Appellants have joined the United States as an additional party to those individual Defendants who are presumably citizens somewhere, although we are not told where. The United States is not a "citizen". *United States v. Dry Dock Savings Institution,* 149 F.2d 917 (2nd Cir. 1945); cf. *Postal Tel. Cable Co. v. Alabama,* 155 U.S. 482, 487 (1894) (state not a "citizen"). The only provision of the statute permitting additional parties in a suit between "citizens of different states" is 28 U.S.C. §1332(d)(3), which explicitly limits such additional and non-diverse parties to "foreign states or citizens or subjects thereof",

The jurisdiction of this Court is founded upon 28 U.S.C. §1291 by virtue of a Notice of Appeal (Cal. R. V. 1, p. 27), filed May 23, 1957, from a judgment (Order of Dismissal, Cal. R. V. 1, p. 22), filed April 26, 1957, dismissing the Complaint and cause below.

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## QUESTIONS PRESENTED

**No. 15,450—The Guam Appeal**

This appeal presents the questions:

1. Should this Court now depart from its numerous rulings that it is without jurisdiction of an appeal taken, as this one is, from a mere order declining to vacate or set aside a final judgment?

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a limitation obviously excluding the United States. It is familiar doctrine that §1332 is to be strictly construed to restrict jurisdiction. *Thomsen v. Gaskill,* 315 U.S. 442, 446 (1942); *Indianapolis v. Chase National Bank,* 314 U.S. 63, 76 (1941). It requires no strictness to deny jurisdiction here where not only are the requisite allegations lacking but the Complaint affirmatively shows the lack of the necessary diversity and the Appellants admit (Cal. R. V. 2, p. 6, lines 5-13; Appellants' Brief pp. 46c-46d) that they do not know even the residences of the Defendants.

The Federal Tort Claims Act, also referred to by Appellants in the Complaint, confers no jurisdiction over Government employees or agencies, or organizations acting as agents of the Government. 28 U.S.C. §2679; *Benbow v. Wolfe,* 217 F.2d 203 (9th Cir. 1954); *United States v. Dooley,* 231 F.2d 423 (9th Cir. 1955). It thus confers no jurisdiction over Defendant Cliff House, an instrumentality and agent of the United States (Cal. R. V. 1, p. 11, lines 9-10) like officers clubs, post exchanges and other non-appropriated fund activities generally. See *Standard Oil Co. v. Johnson,* 316 U.S. 481, 485 (1942); *United States v. Forfari,* 268 F.2d 29 (9th Cir. 1959) cert. denied ..... U.S. .....; *Falls City Brewing Co. v. Reeves,* 40 F.Supp. 35, 39 (W.D.Ky. 1941); *Maynard & Child v. Shearer,* 290 S.W.2d 790, 794 (Ky. 1956).

Although the Appellants specify no provision of the Constitution or Acts of Congress relied on for the federal question jurisdiction which they invoke under 28 U.S.C. §1331, it is assumed, from the act of suing, that they must challenge the immunity granted Government agents and employees under the Federal Employees Compensation Act.

2. If the Court overrules its past decisions and entertains the appeal, should an injured Government employee, covered by the Federal Employees Compensation Act, who has applied for and accepted the payment of compensation under the Act, nevertheless be permitted to sue his co-employee of the United States for his injury?

3. If the Court overrules its past decisions and entertains the appeal, has the Appellant proved any "mistake, inadvertence, surprise, or excusable neglect", within the meaning of Rule 60(b), F.R.C.P., sufficient to require the District Court to vacate its judgment of dismissal for lack of prosecution?

**No. 15,680—The California Appeal**

This appeal presents the questions:

1. Has the United States consented to be sued for injuries suffered by a Civil Service seaman on a public vessel, in the course of his employment from acts of other officers and employees of the United States, acting in the course of their employment and under color of their offices, where the injured employee was covered by the Federal Employees Compensation Act and has applied for and accepted the payment of compensation under the Act?

2. May the injured employee, in such a case, debarred from suing the United States, nevertheless be permitted to sue his co-employees of the United States for his injury?

3. May a Government employee recover damages from other Government employees for the conse-

quences of disciplinary action taken against him on the reports and testimony of such other employees?

4. Does a district court lack the power to dismiss an action of which it has no jurisdiction, on its own motion, in order to clear its own docket and protect the parties from the harassment of a multiplicity of actions?

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## STATEMENT OF THE CASE

These cases arise from an altercation, involving only officers and employees of the United States, in the bar of an officers club on Guam, in April, 1954, and from the subsequent disciplinary action against the Appellant William R. Russell and from his claim and award of Government employees compensation for the injury which resulted. Four lawsuits have resulted, which will be described below.

### The Facts

Appellant Russell was a civil service employee of the United States, through the Military Sea Transportation Service of the Department of the Navy (Complaint, Cal. R. V. 1, p. 3, lines 9-13), and was serving as an able bodied seaman on the USNS GENERAL C. G. MORTON, a civilian-manned Navy transport (Appellants' Brief p. 7). At the time of the altercation he was on shore leave during a brief call of his vessel at Guam.

Appellee William H. Cunningham is likewise a civil service employee of the United States, through the Military Sea Transportation Service, Department of

the Navy. Prior to April 1954, he had at some time been an officer on the USNS GENERAL C. G. MORTON (See Stafford Dep., Guam R. p. 11, lines 7-19). At the time of the altercation it is admitted that he was a civilian officer of the United States assigned as Harbor Pilot at Guam (Appellants' Brief p. 9, lines 20-22). Appellee Frank E. Braley was also a civil service employee of the United States, through the Military Sea Transportation Service, and was serving as an enginering officer on the GENERAL C. G. MORTON (See Braley Dep., Guam R. p. 30, lines 3-7).

Appellee Cliff House was an officers' club[4] on one of the naval stations on Guam. It is admitted that the Cliff House was an instrumentality of the United States, on property of the United States (Complaint, Cal. R. V. 1, p. 11, lines 9-10). In accordance with the usual practice at overseas officers' clubs, a commissioned officer of the United States Navy, Appellee Lieutenant Raymond H. Tschirgi, was serving as manager of the Cliff House (See Guam R. p. 83, lines 6-7).

In the early evening of April 12, 1954, Russell and one Lawrence Goulett, who was a quartermaster on the GENERAL C. G. MORTON (Appellants' Brief

[4]Appellants state and imply at various points in their brief that the Cliff House was not or had ceased to be an officers' club, in order, presumably, to give the impression that Appellant William R. Russell was entitled to use its bar and restaurant. There is nothing in the record to support this implication or suggest that the club was other than an officers' club, as it has been referred to and considered by the parties and witnesses throughout these cases.

p. 7, lines 24-27), visited the Cliff House where they claim to have been directed for dinner. It appears that Russell spent considerable time in the bar. The consistent testimony of the witnesses whose depositions were taken is that he showed the effects of excessive drinking, was belligerent and objectionably profane and obscene, was engaged in at least one altercation before the one which gave rise to this action and nearly provoked others. (See Stafford Dep., Guam R. p. 16, lines 25-26; Dr. Sweet Dep., Guam R. p. 20, lines 1-23; Braley Dep., Guam R. p. 31, lines 18-25; Waxman Dep., Guam R. p. 38, line 13 to p. 39, line 3). It is stipulated that Russell "conducted himself in an obnoxious manner" (Pre-trial Order, Guam R. p. 7, lines 24-26).

While Russell and his companion, Goulett, were creating a disturbance in the bar, Appellee Cunningham and his wife and children were eating dinner in the dining room of the club. (See, e.g., Stafford Dep., Guam R. p. 13, lines 1-7). It is apparently unquestioned that Lieutenant Tschirgi, the club manager, had difficulty in maintaining order and persuading the offenders to leave and that he went to the dining room and asked Appellee Cunningham for assistance and that this was done because Appellee Cunningham was known to know the crew of the GENERAL C. G. MORTON, including Russell, and to have many friends among them (Complaint Cal. R. V. 1, p. 8, lines 3-4; Pre-trial Order, Guam R. p. 8, lines 7-11; see Alexander Dep., Guam R. p. 28, lines 3-4). It appears that Appellee Cunningham agreed and went

to the bar, where he was unsuccessful in quieting Russell or persuading him to leave, and that he then pretended to call the Security Police, after which he was attacked by Russell and Goulett, and that Russell, after being repelled by Appellee Cunningham, fell and struck and broke his glasses, as a result of which he lost the sight of one eye.[5] Appellee Braley appears to have been on the immediate scene at the time of this altercation. It is unquestioned that Appellee Cunningham was, at the time, engaged in the "preservation of order in the Cliff House" (Complaint, Cal. R. V. 1, p. 11, lines 23-24) and that, in this, as in all matters connected with these cases, the individual Appellees were "agents of the United States, acting within the scope of their agency and in the line of duty" (Complaint, Cal. R. V. 1, p. 11, lines 11-15).

It appears that, within hours after the injury to Appellant, an official investigation of the incident was made by one John Ahrendt, a Navy investigator (Guam R. p. 49, lines 18-19). Appellee Cunningham was interviewed and gave his statement of the matter to this investigator. It is claimed (Complaint, Cal. R. V. 1, p. 5, lines 22-24) that Appellee Cunningham reported Russell's misconduct to Captain William H. Bang, who was the master of the GENERAL C. G. MORTON (See Guam R. p. 40, line 18), as a result of which disciplinary proceedings were taken against Russell. It is also claimed (Complaint, Cal. R. V. 1,

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[5]The most complete eyewitness account, in the record, beginning with the request to Appellee Cunningham, is found in Braley's deposition (Guam R. p. 31, line 25 to p. 36, line 10).

p. 6, lines 18-23) that Appellee Cunningham reported the matter to the police of Guam, although it is not said that any criminal action was prosecuted.

Russell promptly retained attorneys, Duffy and O'Connor, and brought suit on April 26, 1954, 14 days after the incident, against Appellee Cunningham, in the District Court of Guam, for $163,000, on account of alleged assault and battery (Guam R. p. 1).

Subsequently, during the month of April 1955, through the same attorney who now appears for them in this Court, Appellants filed three new actions, of which the present California action No. 34558 (No. 15,680 in this Court) is the third in time sequence. The first two were filed April 7, 1955; one, Civil No. 34549, was filed in the United States District Court for the Northern District of California (Cal. R. V. 1, p. 29); the other was filed in the Superior Court of the State of California, in San Francisco, and later removed to the Federal District Court as Civil No. 34815 (Cal. R. V. 1, p. 56). The federal court action, No. 34549, invoked the federal question and diversity jurisdictions and Federal Tort Claims Act jurisdiction and named all of the Appellees here plus additional defendants,[6] alleging generally assault and bat-

[6]The additional defendants are George W. Hackworth, Robert L. Peterson and William L. Alexander, all civil service employees of the United States. Hackworth was Chief Radioman of the GENERAL C. G. MORTON (See Stafford Dep., Guam R. p. 12, lines 9-10); Peterson was Second Officer of the GENERAL C. G. MORTON (See Stafford Dep., Guam R. p. 12, lines 6-7); Alexander was Chief Steward of the GENERAL C. G. MORTON (See Alexander Dep., Guam R. p. 27, lines 10-12). All three are charged with libel or slander in having reported the misconduct of Russell by testimony in disciplinary proceedings or otherwise (Complaint in Civil No. 34549, Cal. R. V. 1, pp. 35-41).

tery, libel, slander and malicious prosecution. The California state court action was similar except for the omission of the United States as a party.

In the third California case, No. 34558 (No. 15,680 in this Court), the Complaint below (Cal. R. V. 1, p. 1) was filed April 11, 1955 by Appellants, man and wife, against Appellees United States, Cunningham, Braley, Tschirgi and Cliff House, and 60 avowedly fictitious defendants. The defendants were charged variously with assault and battery, libel, slander and malicious prosecution.

The Appellees, on August 2, 1955, removed the State court action to the Federal District Court, under 28 U.S.C. §1442, where it was docketed as Civil No. 34815 (Cal. R. V. 1, p. 56). An Order (Cal. R. V. 1, p. 19) was secured dismissing Civil No. 34549 as to the United States for lack of Tort Claims Act jurisdiction and staying the companion cases, Civil No. 34558 (No. 15,680 in this Court) and Civil No. 34815 on the grounds that they presented the same claims against the same parties.[7]

In accordance with its policy,[8] the Department of Justice, at the request of the Secretary of the Navy, undertook the defense of the Government's employees, Appellees in these cases, who were being sued for acts

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[7]From this non-appealable order the Appellants took an appeal in No. 34549 (No. 15,034 in this Court) which was duly dismissed by this Court. *Russell v. Hackworth, et al.*, 233 F.2d 503 (9th Cir. 1956).

[8]See R.S. 367 (5 U.S.C. §316) and 31 Comp. Gen. 661 (1952).

done by them in the performance of their official duties and under color of their offices.[9]

Meanwhile Russell filed his claim for compensation under the Federal Employees Compensation Act, under which he ultimately received an award and was paid (Cal R. V. 2, p. 8, lines 2-22).

On August 15, 1955, when, after extensive delay, it appeared that Plaintiff Russell was not ready to go to trial, the District Court of Guam dismissed the Guam action for lack of prosecution. From that judgment, an appeal (No. 14,942) was taken to this Court, which affirmed the judgment of dismissal, in *Russell v. Cunningham,* 233 F.2d 806 (9th Cir. 1956). After the affirmance, Plaintiff-Appellant made a motion, under Rule 60(b), F.R.C.P., to set aside the judgment of dismissal, from the denial of which the instant appeal, No. 15,450, has been taken.

Subsequently, and while the Guam appeal (No. 15,450) was pending, the District Court for the Northern District of California, on April 25, 1957, held a hearing (Cal. R. V. 2) to review the records in the three cases before it, No. 34549, No. 34558 (No. 15,680 in this Court) and No. 34815. At this hearing, it appeared that Plaintiff-Appellant Russell admitted coverage under the Federal Employees Compensation Act and receipt of an award under the Act and that

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[9]The suits are typical of those brought against Government officers in state courts, which, like the California state court action referred to above (N.D.Cal. No. 34815 after removal), are removed to the federal court under 28 U.S.C. §1442. Cf. *De Busk v. Harvin,* 212 F.2d 143 (5th Cir. 1954) (claim for maliciously procuring discipline and discharge of employee).

all of the claims of Plaintiffs-Appellants against others than the United States were already placed in litigation in the three earlier suits, in which any possible jurisdiction had already been invoked. Accordingly, Judge Goodman rendered a judgment dismissing California action No. 34558, from which the instant appeal No. 15,680 has been taken.

Eventually, both appeals were ordered by this Court to be heard together. A narrative of the significant proceedings in each of the instant cases follows.

**No. 15,450—The Guam Appeal**

The action in the District Court of Guam against Appellee Cunningham alone, for assault and battery, was filed April 26, 1954 (Guam R. p. 1). Promptly, on May 22, 1954, Plaintiff Russell took the depositions of six witnesses on behalf of Plaintiff, including the deposition of Appellee Braley (Guam R. pp. 10-41). These depositions presumably were uniformly disappointing to the Plaintiff.

The Guam action came on for pre-trial and, on June 4, 1954, a Pre-trial Order (Guam R. p. 7) was filed which had been approved by the attorneys for both parties and signed by the Judge. The Pre-trial Order and agreement, after reviewing the pleadings, contentions and agreements of fact of the parties, including the stipulation "that the plaintiff had conducted himself in an obnoxious manner" (Guam R. p. 7, lines 24-26), went on to provide which witnesses would testify in person and which by depositions. The Plaintiff Russell was to testify by deposition, as was

his companion, Goulett (Guam R. p. 8, lines 25-26). The depositions previously taken by Plaintiff (Guam R. pp. 10-41) were to be introduced by Defendant without objection (Guam R. p. 9, lines 10-13). The Pre-trial Order continued with a provision that the parties should be bound by the stipulations set forth therein and that trial should be held Monday, August 2, 1954, at 9:30 a. m.

On July 30, 1954, the trial date was ordered set aside and the case continued for resetting (Guam R. p. 168, line 14). No further action appears on the docket until March 1, 1955, when a motion was made to require security for costs to be posted, as required by the local rules in Guam (Guam R. p. 168, line 17). At the hearing of this motion, the Court, at the suggestion of Russell's own counsel, set the case for trial on April 18, 1955, a year after the incident (Guam R. p. 197, lines 8-15).

Thereafter, the Guam action, previously set for trial April 18, 1955, was, for some reason, set over to May 3, 1955 (See Guam R. p. 52, lines 2-3). On April 19, 1955, Appellant filed a Motion for Postponement of Trial (Guam R. p. 50) and Affidavit in support of the Motion (Guam R. p. 44). In his Affidavit, Russell, notwithstanding the stipulation and order that he testify by deposition, gave as a reason for postponement his desire to be present in person to testify (Guam R. p. 49, line 3). In addition, he asserted the desire to take new depositions of Braley and Alexander, upon the ground that the depositions already taken by him were not satisfactory to him, and to take the deposi-

tion of Robert Peterson, notwithstanding a previous stipulation (Guam R. p. 40, lines 15-16) that Peterson's deposition not be taken. He stated (Guam R. p. 44, lines 19-22) that he would need not less than three, and preferably four, months to prepare for trial. The motion was made by Appellant on his own behalf and not through his attorney of record. The Court, on April 19, 1955, made an Order (Guam R. p. 51) continuing the trial to August 15, 1955 and ordering further that "the Plaintiff will be expected to be present at that time to testify in person or to testify by deposition, since this order assumes at the present time that further continuance will not be granted."

Despite the court's order that no further continuance would be granted, Appellant, this time through his attorney of record, on August 10, 1955, made a Motion for Postponement of Trial or for Dismissal without Prejudice (Guam R. p. 53), accompanied by an Affidavit of his attorney (Guam R. p. 52) which does not appear to set forth any satisfactory reason for the failure of the Appellant to have his deposition taken.[10] The motion was heard August 12, 1955, and was denied (Guam R. p. 172, lines 2-8). When the case duly came on for trial, August 15, 1955, the Plaintiff's counsel stated that he was unable to proceed to trial and an Order of Dismissal for Lack of Prosecution was made (Guam R. p. 55). In making

[10]Appellants' counsel complains (Appellants' Brief p. 83) of the "cumbersome" and impliedly expensive procedure required to take this deposition on notice. Presumably he refers to the necessity of mailing to Appellant Cunningham's counsel on Guam a notice that Russell's deposition would be taken at a certain time and place in San Francisco. Rule 30(a), F.R.C.P.

the Order the Court also made a number of findings of fact, which, although interesting, were, of course, superfluous in an order of this character. An appeal was taken from this judgment of dismissal (Guam R. p. 61).

This Court, on May 21, 1956, affirmed the judgment of the District Court of Guam dismissing the action there for lack of prosecution. *Russell v. Cunningham,* 233 F.2d 806 (9th Cir. 1956). This Court noted the attempt of Appellant to rely on statements outside the record and observed that it was open to the Appellant to ask the lower court to consider the effect of such statements, by a motion under Rule 60(b), F.R.C.P.

Although Appellant had had since August 15, 1955 to do so, it was not until August 9, 1956 that Appellant filed his motion to vacate in the court below (Guam R. p. 76). He did not notice it for hearing and it remained to be called up on the Court's own initiative (Guam R. p. 172, line 24 to p. 173, line 2). From the affidavits accompanying the motion it appears that Russell was actually on Guam during two days, June 21-22, 1955, when his deposition could have been taken in plenty of time for the trial date (Guam R. pp. 139-141; See also the Court's comments, Guam R. p. 224, lines 22-28).

From the Affidavits it also appears that, while the attorneys of record for Russell continued to be Duffy and O'Connor, a San Francisco attorney had been engaged to take certain depositions, that Russell was obtaining advice from the San Francisco attorney and that the reason why his case was not prepared for

trial was that he had been advised by the San Francisco attorney to testify in person, contrary to the position taken and stipulated to by his attorneys of record and ordered by the Guam Court (Appellants' Brief p. 20, lines 13-15; see also Guam R. pp. 87-88, 94, 202, 216, 222). The main theme of the affidavits in support of the motion to vacate is the inability of Russell to be present on Guam at the trial date in accordance with the advice he had received from San Francisco counsel. No explanation appears as to why his deposition could not have been taken on Guam, June 21-22, 1955, in accordance with the pre-trial stipulation and order.

When the motion was called up, on the Court's own initiative, it was fully heard and carefully considered (Guam R. pp. 212-227) and was denied by an Order of October 26, 1956 (Guam R. p. 158). The present appeal in No. 15,450 was taken from this denial.

Although Notice of Appeal (Guam R. p. 158) was filed November 21, 1956, a Designation of Record was not filed in the lower court until January 26, 1957 (Guam R. p. 163). The records of this court will show that the case was docketed here February 25, 1957, although no extension of time to file and docket was applied for or granted in the lower court. The delay of 2½ years in the preparation of the record here has been ostensibly due to the desire of the Appellant to augment the record with a considerable body of material, comprised in Volume II of the Guam Record, most of which (all but pp. 211-229), antedates Russell's first appeal and has nothing to do with his motion to vacate the final judgment.

**No. 15,680—The California Appeal**

In Paragraph 1C of the Complaint in California case No. 34558 (No. 15,680 in this Court), jurisdiction is alleged to be founded upon the "existence of diversity of citizenship between . . . Plaintiffs and . . . Defendants", upon "the existence of rights created and based upon federal laws of the United States", and, "as to Defendant United States Government and its agents upon the existence of rights under the Federal Tort Claims Act". Plaintiffs allege, in Paragraph 1B of the Complaint, that they "reside in San Francisco, California" and that "each Defendant is a resident of a State or Territory other than . . . California". The Complaint contains no allegation whatever of the citizenship of any party. Appellants admit elsewhere that they do not know the citizenship of the Defendants (Cal. R. V. 2, p. 6, lines 5-13; Appellants' Brief pp. 46c-46d).

The Complaint is in 10 counts and alleges an assault and battery by Defendant Cunningham as well as libel, slander and malicious prosecution by him, resulting in disciplinary and criminal actions against Plaintiff William R. Russell, and assault and battery by Defendant Braley. It alleges that Defendant Tschirgi caused an assault and battery by Defendant Cunningham, and also alleges slander and perhaps malicious prosecution by Defendant Tschirgi, resulting in disciplinary and criminal actions against Plaintiff William R. Russell. It charges the Cliff House, as principal, with all of the actions of the individual defendants, as agents, and charges a conspiracy of all

the defendants in the alleged assault, battery, libel and slander, etc. Plaintiff Anna L. Russell, as wife of Plaintiff William R. Russell, adopts all of these charges and makes a claim for loss of consortium. Finally, the Complaint alleges that all of the other defendants were agents, employees or instrumentalities of Defendant United States acting within the scope of their agency and seeks to charge the United States with liability.

The District Court for the Northern District of California was well aware of the pending Guam action, as well as those actions it had before it, and the California cases had all been stayed pending the final result in the Guam action. In April, 1957, Judge Goodman, of the California court, set all three cases, including No. 34558 (No. 15,680 in this Court) for a hearing on April 25, 1957, to examine the records, inquire about progress in the Guam action and determine what could be done with the cases. The transcript of that hearing is Volume II of the record in the California case. It was at that hearing that it was first made of record that Russell had not only applied for but received compensation under the Federal Employees Compensation Act and it was admitted then by Appellants' counsel that the United States could not be sued (Cal. R. V. 2, p. 8).

At the hearing, Appellants' counsel agreed that Civil No. 34558 (No. 15,680 in this Court) should be dismissed in its entirety since, in every respect, it duplicated cases filed earlier and since it afforded no different or additional basis of acquiring jurisdiction

(Cal. R. V. 2, pp. 12-13). The California court recognized the exclusiveness of the Guam action as to the assault and battery charge against Appellee Cunningham and proposed to dismiss those charges in all the California actions (Cal. R. V. 2, p. 22, lines 5-8), and Mr. Lawrence also agreed to this (Cal. R. V. 2, p. 22, line 9).

At the conclusion of the hearing, Judge Goodman, on the basis of the agreed facts, made the order dismissing the instant action, No. 34558 (No. 15,680 in this Court) and also ordered the earlier actions, No. 34549 and No. 34815 dismissed as to Defendant Cunningham, with respect to the assault and battery charge of which the District Court of Guam was already possessed. These orders were all combined in one document filed April 26, 1957 (Cal. R. V. 1, p. 22), from which, so far as it affects No. 34558 only, the instant appeal No. 15,680 was taken.

Appellants, in the California case, No. 34558 (No. 15,680 in this Court), on May 20, 1957, filed a Motion for Relief from Orders of Dismissal (Cal. R. V. 1, p. 24) and, on May 23, 1957, filed a Motion for Leave to Appeal in Forma Pauperis (omitted by Appellants from the typed record). The Motion for Relief was never noticed for hearing by Appellants and was never disposed of. The Motion for Leave to Appeal in Forma Pauperis came on for hearing before Judge Goodman, August 5, 1957, and was denied with a certification that this appeal is not taken in good faith (Cal. R. V. 1, p. 59).

## STATUTES INVOLVED

The pertinent provisions of the Judicial Code, 28 U.S.C. §§1331 and 1332, and the Federal Employees Compensation Act of September 7, 1916, c. 458, 39 Stat. 742 (as amended 5 U.S.C. §§751 *et seq.*), at §§26, 27, 42 (as amended, 5 U.S.C. §§776, 777, 793) are set forth in the Appendix, *infra.* The pertinent provisions of the Federal Tort Claims Act, at 28 U.S.C. §2680(h), appear in the text of the Argument, *infra.*

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## SUMMARY OF ARGUMENT

The Guam appeal (No. 15,450) is taken, not from the final judgment in the case, which has already been appealed once and affirmed, but from a mere non-appealable order denying a motion to set aside or vacate the final judgment. Accordingly, under the settled rule expressed in numerous decisions of this Court and the Supreme Court, the Guam appeal should be dismissed for lack of jurisdiction. *Hicks v. Bekins Moving & Storage Co.,* 115 F.2d 406 (9th Cir. 1940).

The Appellants have no right to sue the United States for Appellant's injury as they seek to do in the California action (No. 15,680 in this Court) since it is admitted that Appellant, as a civil service employee of the United States, is covered by the Federal Employees Compensation Act, under which he has applied for and received an award of compensation for his injury. The Act is exclusive of any other right of the employee or his wife to sue or otherwise

recover against the United States for an injury incident to his service. *Johansen v. United States,* 343 U.S. 427, 1952 A.M.C. 1043; *Thol v. United States,* 218 F.2d 12 (9th Cir. 1954). In addition, the particular claims asserted are all expressly excepted from the consent to sue granted in the Federal Tort Claims Act, upon which Appellants rely. 28 U.S.C. §2680(h).

The Federal Employees Compensation Act is exclusive not only as to the United States, but also as to its agents and employees. It would thwart the Congressional purpose to permit either the Government, as subrogee, or the injured employee to recover against co-employees or other agents of the Government, where the compensation remedy is provided. *Johansen v. United States,* 343 U.S. 427, 1952 A.M.C. 1043; *United States v. Gilman,* 347 U.S. 507 (1954). It is settled law that such other agents or employees of the Government are not "third persons" whom the Federal Employees Compensation Act permits the injured employee or the Government, as subrogee, to sue. Accordingly, Appellants are barred from suing not only the United States, but also the other defendants in California case No. 34558 (No. 15,680 in this Court), and Appellee Cunningham in the Guam case (No. 15,450 in this Court), for Appellant's service-incident injury.

With respect to Appellants' claims, in the California case (No. 15,680 in this Court), for libel and slander, it is apparent that these charges are directed at reports and testimony of Government employees in connection with official investigations and disciplinary

proceedings and, evidently, a report of the circumstances of Appellant's injury to the Guam police. Under long settled law, all such statements are absolutely privileged in the interest of law enforcement and the unfettered administration of Government employee relations and discipline and accordingly such charges are strictly internal disciplinary matters not actionable in court. *Mellon v. Brewer,* 18 F.2d 168, 171 (D.C. Cir. 1927) cert. denied 275 U.S. 530, and cases cited; *Vogel v. Gruaz,* 110 U.S. 311 (1884).

The District Court, in California case No. 34558 (No. 15,680 in this Court) was entirely correct in dismissing the case below, since it had no jurisdiction. The Federal Employees Compensation Act and the exceptions in the Federal Tort Claims Act precluded jurisdiction against the United States; the requirements of diversity jurisdiction were shown not to be met by the Complaint itself; and there was no showing of any basis for federal question jurisdiction without anticipating defenses not in the record, which is not enough to sustain jurisdiction. In addition, the record shows that any jurisdiction of the subject matter here which it was possible to obtain had already exclusively attached in other cases before this one was filed. Accordingly, the court below, having undoubted power to regulate its own docket, on its own motion, correctly dismissed this action, of which it had no jurisdiction, in the interest of preventing an abusive multiplicity of suits.

## ARGUMENT

### I

### THE APPEAL FROM THE DISTRICT COURT OF GUAM IN NO. 15,450 IS TAKEN FROM A NON-APPEALABLE ORDER AND SHOULD THEREFORE BE DISMISSED FOR LACK OF JURISDICTION

*Hicks v. Bekins Moving & Storage Co.,* 115 F.2d 406 (9th Cir. 1940), the leading case in this Circuit on dismissal by the district courts for lack of prosecution, requires dismissal of the Guam appeal presently before the Court, for lack of jurisdiction, as taken from a non-appealable order, rather than from the final judgment in the case.

In the *Hicks* case, as here, a judgment of dismissal for lack of prosecution was entered and appealed from. Subsequently, Hicks made a motion, as did Appellant Russell here, to vacate and set aside the judgment upon the grounds of excusable neglect, supporting his motion with affidavits of the circumstances leading up to the dismissal. From the denial of this motion, he also appealed.

Since Hicks moved promptly, in contrast to Appellant Russell, both of his appeals came on to be heard together in this Court. This Court affirmed the judgment of dismissal and in doing so it properly considered only the record made prior to the notice of appeal from the judgment.[11] In the appeal from the

[11]See Transcript of Record in No. 9511 in the records of this Court. The ruling that the affidavits in support of the motion to set aside the judgment are no part of the record in reviewing the judgment of dismissal was made explicit in *Bowers, et al. v. E. J. Rose Mfg. Co.,* 149 F.2d 612, 613 (9th Cir. 1945) cert. denied

denial of the motion, under Rule 60, to vacate and set aside the judgment on the ground of excusable neglect, this Court, of its own initiative, dismissed the appeal for lack of jurisdiction, noting that it had jurisdiction to review only final judgments and following the settled rule that an order denying such a motion does not constitute another final judgment in the same case.[12]

In the Notice of Appeal in the instant Guam case (Guam R. p. 158), Appellant Russell vaguely purports not only to appeal from denial of his motion but to appeal anew from the judgment of dismissal already once appealed from and affirmed in *Russell v. Cunningham,* 233 F.2d 806 (9th Cir. 1956) (No. 14,-942). Such a new appeal from the same judgment cannot be entertained. As the Court said in *Thompson v. Maxwell Land Grant & Railway Co.,* 168 U.S. 451, 456 (1897), "[W]hatever has been decided on one appeal or writ of error cannot be reëxamined on a second appeal or writ of error brought in the same suit."[13]

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326 U.S. 753, where the Court followed *Hicks* in again dismissing the appeal from denial of the motion and considering only the simultaneous appeal from the judgment of dismissal.

[12]Nor does such an order suspend the finality of the judgment already entered. Rule 60(b) F.R.C.P.: "A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation."

[13]Even in a case where the appellate court reverses a judgment below and it is vacated and a new judgment entered, so that a new appeal is possible, the second appeal brings up only the proceedings subsequent to the mandate on the first appeal. *Noonan v. Bradley,* 12 Wall. 121, 129 (1870); *Freeman v. Smith,* 62 F.2d 291, 293 (9th Cir. 1932) cert. denied 282 U.S. 904.

The present Guam appeal is squarely within the settled rule applied by this Court in the *Hicks* case,[14] from which it is indistinguishable, and the Guam Appeal (No. 15,450) should therefore be dismissed.[15]

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[14]The *Hicks* case, itself firmly grounded on previous decisions of this Court and the Supreme Court, has since been regularly applied in dismissing appeals, such as the present one, from orders denying amendments or vacations of judgments, such orders being entirely discretionary with the trial courts. *Bowers, et al. v. E. J. Rose Mfg. Co.,* 149 F.2d 612, 613 (9th Cir. 1945) cert. denied 326 U.S. 753 (motion to set aside judgment of dismissal); *Simons v. United States,* 162 F.2d 905, 906 (9th Cir. 1947) (motion to set aside judgment of dismissal); *Lunn v. F. W. Woolworth Co.,* 207 F.2d 174, 175 (9th Cir. 1953) cert. denied 346 U.S. 900 (motion to amend judgment). Cf. *Libby McNeil & Libby v. Malmskold,* 115 F.2d 786, 787 (9th Cir. 1940) (The fact that an "order refusing a new trial may be an abuse of discretion which would justify its consideration by an appellate court does not make the order itself appealable. The review must be incident to an appeal from an appealable order such as a final judgment.").

[15]It may be noted that the motion, from the denial of which the Guam appeal was taken, is without merit. No showing appears of any "mistake, inadvertence, surprise, or excusable neglect" within the standards laid down by the courts, under Rule 60(b). An excellent review of the standards, including the California antecedents of the rule, appears in *Ledwith v. Storkan,* 2 F.R.D. 539 (D. Neb. 1942). See also *Federal Enterprises v. Frank Allbritten Motors,* 16 F.R.D. 109 (W.D. Mo. 1954); *Washington Farms v. United States,* 122 F. Supp. 31 (M.D. Ga. 1954); *United States v. Young,* 17 F.R.D. 91 (N.D. Ill. 1953).

## II

### APPELLANTS' SUITS IN BOTH OF THE INSTANT APPEALS ARE BARRED BY THE RULE THAT APPELLANTS' RIGHTS UNDER THE FEDERAL EMPLOYEES COMPENSATION ACT, FOR THE INJURY INCURRED BY APPELLANT AS A CIVIL SERVICE EMPLOYEE OF THE UNITED STATES, IN THE SERVICE OF HIS VESSEL, ARE EXCLUSIVE OF ANY OTHER RIGHT OR REMEDY AGAINST THE UNITED STATES, ITS AGENTS OR EMPLOYEES

#### A. The Federal Employees Compensation Act Is Unquestionably Applicable and Exclusive as to Appellants' Claims for Injury.

It is undisputed that Appellant William R. Russell was a civil service seaman on a public vessel of the United States, that he was injured while on shore leave from his vessel at Guam, and that he applied for and received an award, and was paid, under the Federal Employees Compensation Act of September 7, 1916, c. 458, 39 Stat. 742 (as amended, 5 U.S.C. §751 *et seq.*).

The exclusive character of the compensation remedy as to such civilian public vessel seamen, even in the absence of any statutory provision, has been declared in *Johansen v. United States,* 343 U.S. 427, 1952 A.M.C. 1043 and recently reaffirmed in *Patterson v. United States,* 359 U.S. 495, 1959 A.M.C. 1640. These cases make it plain that the United States has not consented to be sued by employees in the status of Appellant Russell in this case, for injuries suffered while in the service of their vessels, and that the entire rights of such employees and their dependents against the United States for such injuries are those provided

by the Federal Employees Compensation Act.[16] As the Supreme Court said in the *Johansen* case, "the Federal Employees Compensation Act is the exclusive remedy for civilian seamen on public vessels. As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect." (343 U.S. at 441, 1952 A.M.C. at 1053.) This immunity undoubtedly extends to such non-appropriated-fund activities and organizations as officers' clubs and post exchanges. Cf. *Standard Oil Co. v. Johnson,* 316 U.S. 481, 485 (1942); *Nimro v. Davis,* 204 F.2d 734, 736 (D.C. Cir. 1953) cert. denied 346 U.S. 901.

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[16]Similarly, without express prohibition in the Federal Tort Claims Act, other classes of Government employees having their own systems of compensation are held precluded from suit under its provisions. *Feres v. United States,* 340 U.S. 135, 144 (1950) (Serviceman. "This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or deaths of those in armed services. . . . If Congress had contemplated that this tort act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other."); *Lewis v. United States,* 190 F.2d 22 (D.C. Cir. 1951) cert. denied 342 U.S. 869 (United States Park Police); *Aubrey v. United States,* 254 F.2d 768 (D.C. Cir. 1958) (Employees of Naval Officers' mess, a non-appropriated fund instrumentality of United States, carrying employees' compensation insurance pursuant to Act of June 19, 1952, c. 444, §2, 66 Stat. 139, as amended, 5 U.S.C. §150k-1); *United States v. Forfari,* 268 F.2d 29 (9th Cir. 1959) cert. denied ..... U.S. ..... (Employee of Naval shipyard cafeteria, a non-appropriated fund instrumentality of the United States, carrying employees' compensation insurance pursuant to Act of June 19, 1952, c. 444, §2, 66 Stat. 139, as amended, 5 U.S.C. §150k-1).

Although, in this case, Appellant has received an actual award and payment of compensation, the contentions of Appellants concerning the "finality" of the award make it appropriate to point out that the existence or amount of any actual award or payment under the Act is immaterial. That the Compensation Act applies to Appellant in this case is undisputed, since the record shows that he has consistently taken the position that he was entitled to an award under the Act. Where the coverage of the Compensation Act exists, suit against the United States is precluded even though no claim for compensation has been made. *United States v. Firth,* 207 F.2d 665 (9th Cir. 1953). And even though no actual benefits are payable under the Act for the particular loss or injury involved, there still is no consent to sue the United States. *United States v. Forfari,* 268 F.2d 29 (9th Cir. 1959) cert. denied ..... U.S. .....; *Thol v. United States,* 218 F.2d 12, 13 (9th Cir. 1954); *Underwood v. United States,* 207 F.2d 862 (10th Cir. 1953) (attempt of spouse to sue for loss of consortium); *Mayo v. United States,* 139 F. Supp. 46, 1956 A.M.C. 1201 (N.D.Cal.); *Hartzog v. United States,* 139 F. Supp. 47, 1956 A.M.C. 1203 (N.D.Cal.);[17] *Swenarski v. United States,* 124 F. Supp. 200, 1954 A.M.C. 1408 (N.D.Cal.). Cf. *Briemhorst v. Beckman,* 227 Minn. 409, 426, 35 N.W.2d 719, 730 (1949); *Blaine v. Hut-*

[17] "[T]he central thought of the Supreme Court decision is that the United States has not consented to be sued for damages by or on behalf of members of the civil service component of the crew of military transport vessels, and that the Federal Employees Compensation Act of 1916 is the only remedy available to such employees." (139 F.Supp. at 48, 1956 A.M.C. at 1204).

*tig Sash & Door Co.,* 232 Mo. App. 870, 105 S.W.2d 946 (1937).

Seamen have long been regarded as in the service of their vessels while on shore leave, so as to recover maintenance and cure for injuries sustained at such times. Although there was some doubt, when Appellant Russell applied for Compensation, that he could be awarded it, this was not because of his employment status, but because of the circumstances in which he was injured. The decision in *Adams' Case,* 1956 A.M.C. 271 (Dept. of Labor, Employees Compensation Appeals Board, Dec. 7, 1955) followed the analogy to maintenance and cure and applied the very liberal standards of modern cases concerning the facts which would disqualify a seaman on shore leave from receiving maintenance and cure or compensation under other acts.[18] It was this decision which opened the way for Appellant Russell to the actual recovery of benefits under the Act, which the record shows he received.

Appellants contend that, as a condition to the dismissal of their suits against the Government, they should receive some kind of "binding" agreement that the award of compensation is final and irrevocable,[19] or else what amounts to a judgment to the

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[18]See *Aguilar v. Standard Oil Co.,* 318 U.S. 724, 1943 A.M.C. 451; *Farrell v. United States,* 336 U.S. 511, 1949 A.M.C. 613; *Warren v. United States,* 340 U.S. 523, 1951 A.M.C. 416; *Turner v. City of New York,* 249 App.Div. 790, 292 N.Y.Supp. 375 (1936); *Smith v. Coykendall's Estate,* 251 App.Div. 757, 295 N.Y.Supp. 575 (1937) aff'd 277 N.Y. 537, 13 N.E.2d 463 (1938).

[19]Of course any such agreement would be illusory, since no Government agent has authority to agree to preclude the execution of an Act of Congress at some later date.

same effect. They thus ask what no other Government employee receives or is entitled to. Appellants' demand arises from the misconception that the bar to their suits is dependent upon actual payment, rather than coverage, under the Compensation Act, which we have already shown to be incorrect. The absurdity of this demand will be appreciated when we recall that the suits of *Johansen, Patterson* and others whose cases are cited here were required to be dismissed unconditionally although the employees suing, unlike Appellant, had not received any awards at all.

Seemingly, Appellants would have the Court impose upon the judgment below in the California case a condition concerning the "finality" of the Compensation award. Under §42 of the Act (as amended, 5 U.S.C. §793) (Appendix), neither this Court nor any other has jurisdiction to review or control any award, or order concerning an award, under the Act. *Rivera v. Mitchell,* 244 F.2d 783 (D.C.Cir. 1957) cert. denied 355 U.S. 862; *Blanc v. United States,* 244 F.2d 708 (2nd Cir. 1957) cert. denied 355 U.S. 874; *Hancock v. Mitchell,* 231 F.2d 652 (3rd Cir. 1956); *Calderon v. Tobin,* 187 F.2d 514, 516 (D.C.Cir. 1951) cert. denied 341 U.S. 935 ("The federal employees' compensation allowances are grants by the Congress, and the agents of the Congress have power to determine the recipients of such grants. If Congress chose to preclude judicial review of the selection of the objects of its bounty, it could do so."): What the Court is forbidden to do by judgment directly against the United States, it certainly may not do by the imposition of conditions

upon a judgment required to be entered in favor of the United States. Cf. *The Antelope,* 12 Wheat. 546, 550 (1827) (attempt to impose costs unauthorized by statute as a condition to execution of decree).

Appellants, in suing the United States, have relied upon the Federal Tort Claims Act, 28 U.S.C. §§1346 (b), 2671 *et seq.* Because of the exclusiveness of the Federal Employees Compensation Act, it is plain that the United States has not consented to be sued by Appellant under any statute whatever. We note in passing, however, the lack of substance in Appellants' reliance upon the Federal Tort Claims Act, in particular.

The Federal Tort Claims Act jurisdiction over the United States in certain cases is conferred in 28 U.S.C. §1346(b). The Act, at 28 U.S.C. §2680, reads in pertinent part:

> The provisions of . . . section 1346(b) of this title shall not apply to—
>
> * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

In view of the explicit allegations of the Complaint, it is hard to see how there could be a clearer case for lack of jurisdiction over the Federal Torts Claims Act. It is obvious that every claim stated by Appellants arises out of one or more of the acts explicitly

enumerated as exceptions to the Tort Claims Act[20] jurisdiction and that, even apart from the Compensation Act, Appellants could not maintain their actions against the United States.[21]

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[20]The exceptions of "assault" and "battery" apply to the use of excessive force, even by a police officer or sentry, in making an arrest, detaining a person, or otherwise attempting to enforce law or keep order. *Stepp v. United States,* 207 F.2d 909 (4th Cir. 1953) cert. denied 347 U.S. 933; *Lewis v. United States,* 194 F.2d 689 (3rd Cir. 1952); cf. *United States v. Hambleton,* 185 F.2d 564 (9th Cir. 1950). The addition of negligence at some point in the chain of causation does not alter the fact that the claim is one "arising out of" assault and battery or mispresentation, as the case may be. *Moos v. United States,* 225 F.2d 705 (8th Cir. 1955); *Clark v. United States,* 218 F.2d 446, 452 (9th Cir. 1954); cf. *Klein v. United States,* 268 F.2d 63, 1959 A.M.C. 1680 (2nd Cir.) (attempt to circumvent the "false imprisonment" exception by alleging negligence); *Rufino v. United States,* 126 F. Supp. 132, 137 (S.D.N.Y. 1954) (the plaintiff cannot circumvent the exception of assault "by pleading some other cause of action" such as "negligence . . . in not preventing an assault"). The words "Any claim arising out of" in 28 U.S.C. §2680(h) mean "any claim originating from, incident to or having connection therewith." *Klein v. United States,* 167 F. Supp. 410, 412 (E.D.N.Y. 1958), aff'd 268 F.2d 63, 1959 A.M.C. 1680 (2nd Cir.).

[21]The Complaint in the California appeal attempts to state an independent claim by Mrs. Russell, based on loss of consortium. Even if the wife would otherwise have a right to sue for loss of consortium, the Federal Employees Compensation Act would bar such a suit in the present case. *Underwood v. United States,* 207 F.2d 862 (10th Cir. 1953); see *Smither and Company v. Coles,* 242 F.2d 220, 222-223 (D.C. Cir. 1957) cert. denied 354 U.S. 914. But as a matter of territorial law, Mrs. Russell would clearly have no right to recover for loss of consortium in any case. This follows from *Filice v. United States,* 217 F.2d 515 (9th Cir. 1954), in which this Court, construing California law, held there could be no such recovery by a wife. The Civil Code of Guam is that of California, adopted with scarcely any change. See Foreword to Civil and Penal Codes of Guam, 1953. The California Civil Code sections which were construed in the *Filice* case, CC §§1708, 1714, 3281, 3282 and 3523 are identical, respectively with Guam CC §§1708, 1714, 3281, 3282 and 3523.

**B. Appellants May Not Be Allowed to Circumvent the Employees Compensation System by Suing Other Employees and Agents of the United States Under the Pretext That Such Employees and Agents Are Third Parties.**

Appellants, whose claim is admittedly subject to the Federal Employees Compensation Act, have sued a number of parties other than the United States, all of whom are affirmatively shown by the record to have been agents and employees of the United States acting as such in all material matters. Presumably Appellants regard these parties as third parties who may be sued under §26 of the Federal Employees Compensation Act (5 U.S.C. §776) and thereby overlook completely the fact that all are Government agents and employees.

It is surely settled that non-appropriated fund activities such as the officers' club in this case, post exchanges, and cafeterias on naval stations are all agencies and instrumentalities of the United States enjoying the same immunities as the United States. *Standard Oil Co. v. Johnson,* 316 U.S. 481, 485 (1942) (post exchange); *Nimro v. Davis,* 204 F.2d 734, 736 (D.C. Cir. 1953) cert. denied 346 U.S. 901 (Navy lunchroom). Manifestly such organizations enjoy the immunity represented by the exclusiveness of the compensation remedy. Appellants, in the present cases, seek to go farther down the economic scale and impose upon co-employees, personally, a burden of which those better able to bear it have been relieved.

Novel as these actions are, under the Federal Employees' Compensation Act, the demand of an employee to impose the burden upon his co-employee for

injuries incident to service has been rejected under the Longshoremen's and Harbor Workers' Act and a number of state compensation acts, all similarly worded.[22] The courts have held, under such acts, that the permission given to sue a "person other than" the employer does not permit the employee to sue his supervisors or other co-employees or agents of the employer. *Doane v. E. I. DuPont De Nemours & Co.,* 209 F.2d 921 (4th Cir. 1954) ("any other party"); *Ginnis v. Southerland,* 50 Wash.2d 557, 313 P.2d 675 (1957) (Longshoremen's and Harbor Workers' Compensation Act, §33, 44 Stat. 1440, 33 U.S.C. §933, as amended: "some person other than the employer"); *Warner v. Leder,* 234 N.C. 727, 69 S.E.2d 6 (1952) ("any person other than the employer"); *White v. Ponozzo,* 77 Idaho 276, 291 P.2d 843 (1955) ("some person other than the employer"); *Bresnahan v. Barre,* 286 Mass. 593, 190 N.E. 815 (1934) ("some person other than the insured" does not include employees or subcontractors or their employees); *Wechsler v. Liner,* 328 Mass. 152, 102 N.E. 2d 92 (1951) ("some person other than the insured"); *Majors v. Moneymaker,* 196 Tenn. 698, 270 S.W.2d 328 (1954) ("some person other than the employer"); *Feitig v. Chalkley,* 185 Va. 96, 38 S.E.2d 73 (1946) ("other person"); *O'Brien v. Rautenbush,* 10 Ill.2d 167, 139 N.E.2d 222 (1956) ("some person other than the employer"); *Mahan v. Litton,* 321 S.W.

[22]Decisions under the state acts are frequently used in construing the similar federal acts. See, e.g., *Thol v. United States,* 218 F.2d 12, 13 (9th Cir. 1954); *Underwood v. United States,* 207 F.2d 862, 864 (10th Cir. 1953).

2d 243 (Ky. 1959) ("some other person than the employer").

In *Ginnis v. Southerland,* 50 Wash.2d 557, 558, 313 P.2d 675, 676 (1957), the court, construing the Longshoremen's and Harbor Workers' Compensation Act, and denying the longshoreman any right to sue the master of the vessel as a third party, said:

> The privity between principal and agent is expressed in the ancient maxim *qui facit per alium facit per se.* Therefore, the master's negligent act was the act of the Grace Lines, Inc., and appellants were not injured by the act of *some person other than the employer.* It follows that the appellants cannot maintain their actions against the master because he is the agent of their employer, the Grace Lines, Inc., and is included in its immunity from liability.

And in *White v. Ponozzo,* 77 Idaho 276, 280, 291 P.2d 843, 845 (1955), the court expressed it this way:

> [T]he co-employee becomes merged in the employer and is not a third person, within the meaning of the compensation law, against whom a damage action may be maintained.

The courts have generally stressed the manner in which the allowance of suits against co-employees would frustrate the policy of the compensation acts. This was well expressed in *Doane v. E. I. DuPont De Nemours & Co.,* 209 F.2d 921, 923, 924 (4th Cir. 1954) where the court said:

> It seems clear that it was the legislative intent to make the act exclusive in the industrial field, so that, in the event of an industrial accident,

> the rights of all those engaged in the business would be governed solely thereby.
>
> * * *
>
> If the contention of defendant in error is sustained (that is—that "other party" refers to and includes a fellow servant), then the employee's right against the fellow servant is assigned by the act to the employer or the compensation insurance carrier. It would follow that the act would not cover the entire field of industrial accidents because common-law litigation would inevitably arise in cases where the injury or death was due to the negligence of another employee. Instead of the loss of such industrial accidents being cast upon business as an expense thereof, the wages of fellow workmen will become an ultimate insurance fund for the exoneration of both industry and compensation insurance carriers for the ultimate loss. Instead of providing relief to workmen, it will place in the power of employers and compensation insurance carriers the right to recoup from workmen loss which should be borne by the business.[23]

The compelling reasons for the policy of the compensation acts in denying suit against a co-employee as a "third party" were also very well explained in the following language from *O'Brien v. Rautenbush,* 10 Ill.2d 167, 174, 139 N.E.2d 222, 226 (1956):

> Under the present act an employee who is injured by a coworker need no longer overcome the time-honored fellow-servant doctrine nor rely entirely upon the solvency of the tort-feasor, but

[23]Quoting *Feitig v. Chalkley,* 185 Va. 96, 102, 104, 38 S.E.2d 73, 75, 76 (1946).

he is assured of immediate, certain relief without the necessity of costly and tedious litigation. Furthermore, if he is unfortunate enough to *cause* the injury of a coemployee, he need not fear the extreme financial burden which might otherwise be forced upon his shoulders by the employer or injured employee. On the other hand, if plaintiff's assertions are correct, an employee who has inadvertently injured a fellow worker would be forced to bear the sole cost of defending and satisfying the common-law action without any part of the cost being passed on to the industry, since the common employer's liability is expressly limited to the compensation award. (Ill. Rev. Stat. 1955, chap. 48, par. 138.11). In view of the fact that a considerable portion of industrial injuries can be traced to the negligence of a coworker, such litigation could reach staggering proportions, and would not only tend to encourage corrupt and fraudulent practices but would also disrupt the harmonious relations which exist between coworkers. The avoidance of such results is most certainly beneficial to the employee.

The plaintiff argues that no reason exists for differentiating between a negligent coworker and an employee of a separate enterprise. Yet he fails to point out that the same unfortunate results do not occur when an injured employee sues a tort-feasor who is engaged by different management. In this later [sic] situation, the tort-feasor's employer would quite likely be personally liable and could be expected to undertake the defense at his own and the industry's expense, and, in addition, the employee relationships of the particular business would in no way be disturbed.

The rights of the Government and the injured employee against responsible third persons are prescribed by §26 (5 U.S.C. §776) (Appendix). It is elementary that when the Congress has occupied the field by legislation such as this, no recovery may be had outside the terms prescribed. This rule is directly applicable to third-party suits under §26; in *United States v. Klein,* 153 F. 2d 55, 59 (8th Cir. 1946), the court, in dealing with a third party claim under §26, said:

> We are of the view that the statutory provisions above referred to furnish the exclusive remedy and that resort cannot be had to any common-law remedies. . . . Where an Act of Congress deals with the subjects to which it relates, that Act is paramount and exclusive, and recovery, if at all, must be had in the mode and by and for the persons, and for the reasons, designated in the Act.

Again, in *Louisville & Nashville R. R. Co. v. Rochelle,* 252 F. 2d 730, 735 (6th Cir. 1958) the court, in discussing rights against a third party, said:

> Under 5 U.S.C. §751 et seq., . . . the rights of the claimant are governed exclusively by the statutory provisions and the Regulations promulgated thereunder.[24]

Under the provisions of §§26 and 27 of the Act, which regulate third party actions, the employee receiving an award of compensation for an injury "caused under circumstances creating a legal liability

[24]The regulations referred to appear at 20 C.F.R. §§3.1-3.6.

upon some person other than the United States to pay damages therefor'' may be required to assign his right of action against such person to the United States. In case the employee is allowed to sue such other person in his own name, provision is made for the reimbursement of the United States out of any recovery. Thus the United States either brings the third party suit itself or at all times is entitled to compel assignment of the plaintiff's claim and is a lienor to the extent of the compensation it has paid.

In the light of *United States v. Gilman,* 347 U.S. 507, (1954), the Bureau of Employees Compensation of the Department of Labor does not demand assignments in cases like the present one, where no person outside the Government service has caused the injury, since no recovery can be had in such a case. Accordingly, no assignment was taken or required by the Bureau as a condition to the payment of Appellant Russell's compensation.

In the *Gilman* case, the Supreme Court held that the United States may not recover over against one of its employees after it has been held liable under the Federal Tort Claims Act. In rejecting the Government claim for indemnity, the Court reviewed the considerations involved, in this language:

> The relations between the United States and its employees have presented a myriad of problems with which the Congress over the years has dealt. Tenure, retirement, discharge, veterans' preferences, the responsibility of the United States to some employees for negligent acts of other em-

ployees—these are a few of the aspects of the problem on which Congress has legislated. Government employment gives rise to policy questions of great import, both to the employees and to the Executive and Legislative Branches. On the employee side are questions of considerable import. Discipline of the employee, the exactions which may be made of him, the merits or demerits he may suffer, the rate of his promotion are of great consequence to those who make government service their career. The right of the employer to sue the employee is a form of discipline. Perhaps the suits which would be instituted under the rule which petitioner asks, would mostly be brought only when the employee carried insurance. But the decision we could fashion could have no such limitations, since we deal only with a rule of indemnity which is utterly independent of any underwriting of the liability. Moreover, the suits that would be brought would haul the employee to court and require him to find a lawyer, to face his employer's charge, and to submit to the ordeal of a trial. The time out for the trial and its preparation, plus the out-of-pocket expenses, might well impose on the employee a heavier financial burden than the loss of his seniority or a demotion in rank. When the United States sues an employee and takes him to court, it lays the heavy hand of discipline on him, as onerous to the employee perhaps as any measure the employer might take, except discharge itself. (347 U.S. at 509.)

The Court then went on to say:

On the government side are questions of employee moral and fiscal policy. We have no way

> of knowing what the impact of the rule of indemnity we are asked to create might be. But we do know the question has serious aspects—considerations that pertain to the financial ability of employees, to their efficiency, to their morale. These are all important to the Executive Branch. The financial burden placed on the United States by the Tort Claims Act also raises important questions of fiscal policy. A part of that fiscal problem is the question of reimbursement of the United States for the losses it suffers as a result of the waiver of its sovereign immunity. Perhaps the losses suffered are so great that government employees should be required to carry part of the burden. Perhaps the cost in the morale and efficiency of employees would be too high a price to pay for the rule of indemnity the petitioner now asks us to write into the Tort Claims Act. (347 U.S. at 510)

The Court, in finally rejecting the claimed right to sue the employee, reviewed its own earlier refusal to extend the common law action of *per quod servitium amisit* to the Government-soldier relation[25] and then concluded:

> The reasons for following that course in the present case are even more compelling. Here a complex of relations between federal agencies and their staffs is involved. Moreover, the claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous

[25] *United States v. Standard Oil Co.*, 332 U.S. 301 (1947).

> to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them. (347 U.S. at 511)

We can perceive no distinction between compensation payments and tort damage payments in this respect; the ruling in *Gilman* forecloses recovery from the co-employee in compensation cases. The present cases are unprecedented in that the beneficiary of compensation has himself sued his co-employees and attempted to treat them as third parties and to recover a judgment from which he would have to reimburse the United States, under §27 of the Act, for the compensation it has paid him. It would be strange indeed if *Gilman* could be circumvented in this manner.

In holding that the Federal Employees Compensation Act is the exclusive remedy of employees situated exactly as Appellant Russell is, without the assistance of any statutory language, the Supreme Court, in *Johansen v. United States,* 343 U.S. 427, 440, 441, 1952 A.M.C. 1043, 1053, said:

> Such a comprehensive plan [federal employees compensation] for waiver of sovereign immunity, in the absence of specific exceptions, would naturally be regarded as exclusive.
>
> * * *
>
> All in all we are convinced that the Federal Employees Compensation Act is the exclusive remedy for civilian seamen on public vessels. As the Government has created a comprehensive system to

award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect.

Just as, in the absence of a statutory provision, the Supreme Court has held that an employee may not sue the United States and that the United States may not sue the employee who injures another and imposes a financial burden upon the Government, so the same rationale precludes the employee from recovering against his co-employee and then repaying the United States as subrogee what it could not have recovered directly by any right of its own. Neither a Government employee, covered by the Federal Employees Compensation Act, nor anyone else on his account, may sue other employees or agents of the Government for a service-connected injury. As the Supreme Court pointed out in the *Gilman* case, the matter of dealing with the responsible Government employees is essentially a disciplinary matter, for which there are regular administrative procedures and which should not be attempted through a lawsuit. Certainly it is not to be handled by a lawsuit brought at the whim of the injured co-employee.

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## III

### APPELLANTS HAVE NO CAUSE OF ACTION FOR LIBEL OR SLANDER

Although Appellants have added to their principal claim of assault and battery in the California case (No. 15,680 in this Court) some ancillary claims of

libel and slander, it is apparent that all of the statements charged as defamatory were absolutely privileged and can not be the subject of an action for damages.

The record shows that the defamation charged is directed at statements given by Appellees Cunningham and Tschirgi to official investigators of the Navy Department, and at reports or testimony, or both, in connection with official disciplinary actions against Russell.[26] The United States and the Cliff House are also charged with liability for these statements.

There is plainly no substance whatever to these charges of defamation. It is settled law that such official reports by Government employees in connection with disciplinary matters or official inquiries or investigations are absolutely privileged. *De Arnaud v. Ainsworth,* 24 App. D.C. 167 (1904); *Farr v. Valentine,* 38 App. D.C. 413 (1912); *Mellon v. Brewer,* 18 F.2d 168 (D.C. Cir. 1927) cert. denied 275 U.S. 530; *Newbury v. Love,* 242 F.2d 372 (D.C. Cir. 1957) cert. denied 355 U.S. 889; *Lyons v. Howard,* 250 F.2d 912 (1st Cir. 1958) rev'd on other grounds (i.e. that C.A. did not extend privilege far enough) sub nom. *Howard v. Lyons,* 360 U.S. 593 (1959). See *Annotation,* 45 A.L.R. 2d 1296, particularly at 1305-1308.

Complaint is also made of reports to the Guam police.[27] Such reports were plainly privileged in the

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[26]See Complaint, Paragraphs 11-14, 26, 27 (Cal. R. V. 1, pp. 5-6, 9) and Guam R. p. 40, line 18 and p. 49, lines 18-19.

[27]See Complaint, Paragraph 26 (Cal. R. V. 1, p. 9).

public interest in law enforcement and complete disclosure of facts for this purpose. *Vogel v. Gruaz,* 110 U.S. 311 (1884).

Clearly, therefore, all of the allegedly defamatory statements were privileged and cannot be made the subject of an action for damages.[28] It may be noted in passing that the United States and its instrumentality, the Cliff House, are obviously protected from suit by the Federal Tort Claims Act exceptions in 28 U.S.C. §2680(h).

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## IV

**THE DISTRICT COURT PROPERLY DISMISSED THE CALIFORNIA CASE FOR LACK OF JURISDICTION IN THE EXERCISE OF ITS POWERS TO CONTROL ITS BUSINESS AND PREVENT ABUSIVE MULTIPLICITY OF SUITS**

It is apparent on the face of the Complaint in California action No. 34558 (No. 15,680 in this Court),

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[28]If, as Appellants claim, the statements of Appellees had been malicious and untrue, the proper course would be a disciplinary proceeding against the offenders. Civilian employees of the Navy are subject to Navy Civilian Personnel Instructions (NCPI), a body of regulations issued under authority of R.S. 161 (as amended, 5 U.S.C. §22). NCPI 45.2-4 provides in part as follows:

> Irresponsible Statements Made By Employees
>
> *a. General.*—It is recognized that an employee, in expressing a grievance, in responding to charges or to statements by others, or in other situations, may express himself in an intemperate manner, orally or in writing. . . . In any case, an individual making such statements may be held responsible for them. . . .

The Standard Schedule of Disciplinary Offenses and Penalties included in NCPI 45.10-1 provides, at Item 23, for penalties ranging from reprimand to removal for "making false or unfounded statements which are slanderous or defamatory about other employees or officials". The appropriate authority with respect to a naval officer would be the Uniform Code of Military Justice, Articles 107, 133.

that the District Court for the Northern District of California had no jurisdiction. For reasons which have already been discussed, there was no Federal Tort Claims Act jurisdiction.[29] Diversity jurisdiction was plainly lacking.[30] Federal question jurisdiction was also lacking, so far as appeared in the Complaint and record before the California District Court at the time of dismissal.[31]

Moreover, it appeared from the record that the jurisdiction of the District Court of Guam over the action there against Defendant Cunningham was unquestioned, and that, as to the other Defendants in

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[29]See footnotes 2 and 3 *supra* and text at footnote 20 *supra.*

[30]See footnote 3 *supra.*

[31]We have chosen in this Court to meet the case on the "merits" by invoking the Federal Employees Compensation Act and pointing out Appellants' complete lack of any right to the recovery sought. If the Federal Employees Compensation Act had been directly put in issue in the District Court, in relation to Appellants' claims against the individual defendants there, then perhaps a colorable claim to federal question jurisdiction under 28 U.S.C. §1331 would have appeared of record. The mere formal statement in the Complaint (Cal. R. V. 1, p. 2, line 25 to p. 3, line 1) invoking such jurisdiction is not enough. *Norton v. Whiteside,* 239 U.S. 144, 147 (1915); *South Side Theatres v. United West Coast Theatres Corp.,* 178 F.2d 648, 649 (9th Cir. 1949) ("The statement of facts upon which the existence of federal jurisdiction depends must affirmatively and distinctly appear in the plaintiff's complaint".); See Form 2(b), F.R.C.P. And the anticipation of defenses in the complaint, or even the actual statement of them in the answer will not suffice to confer federal question jurisdiction. *Gully v. First National Bank,* 299 U.S. 109, 113 (1936). Implied reliance upon the laws of Guam would not avail Appellants since laws of the territories are not "laws . . . of the United States". *Maxwell v. Federal Gold & Copper Co.,* 155 Fed. 110, 112 (8th Cir. 1907); *Adams Exp. Co. v. Denver & R.S. Ry. Co.,* 16 Fed. 712, 715 (C.C.Colo. 1883); cf. *Puerto Rico v. Rubert Hermanos, Inc.,* 309 U.S. 543, 550 (1940); *American Security & Trust Co. v. Commissioners of the District of Columbia,* 224 U.S. 491, 495 (1912).

California action No. 34558 (No. 15,680 in this Court), there was nothing in the case to present any better claim to jurisdiction than what had been established in the earlier California actions (34549 and 34815). Even in cases of potential concurrent jurisdiction, the Court which takes jurisdiction in the first of successive actions acquires an exclusive jurisdiction in that action. *French v. Hay,* 22 Wall. 250, 253 (1875); *Ex Parte City Bank of New Orleans,* 3 How. 292, 314 (1845). Accordingly, upon this ground also, no jurisdiction was acquired by the District Court in California case No. 34558 (No. 15,680 in this Court). The maintenance of that action, the last to be filed, was prima facie vexatious. *Higgins v. California Prune & Apricot Growers,* 282 Fed. 550, 557 (2nd Cir. 1922).

The record below included the particulars of the earlier cases pending and showed that any rights of Appellants claimed in this later case were adequately protected in the earlier suits. The District Court plainly had in mind the exclusiveness of the compensation remedy and of the jurisdiction acquired in the earlier actions. Just as the Court in the earlier action may take the usual course, followed in the *Higgins* case, *supra,* and enjoin the prosecution of the later action, so the court having the later actions, or a single court having two or more actions on the same subject matter between the same parties, may simply dismiss the later action for lack of jurisdiction. That it may and should dismiss *sua sponte,* where it lacks jurisdiction, is surely settled doctrine in the Federal courts.

Since the record below disclosed no basis of jurisdiction, dismissal of California action No. 34558 (No. 15,680 in this Court) was entirely proper. And since any rights of Appellants were protected in other actions, it was proper that the dismissal be without leave to amend.

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## CONCLUSION

For the foregoing reasons we submit that the Guam appeal, No. 15,450, should be dismissed for want of jurisdiction in this Court and that the judgment of the District Court in the California appeal, No. 15,680, should be affirmed.

Respectfully submitted,

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**(Appendix Follows.)**

# Appendix.

## Appendix

### STATUTES INVOLVED

At the time this action was filed, 28 U.S.C. §1331 provided in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

At the time this action was filed, 28 U.S.C. §1332 provided in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof; and
>
> (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

The Federal Employees Compensation Act of September 7, 1916, c. 458, 39 Stat. 742, as amended, provides in pertinent part:

§26 (5 U.S.C. §776):

> If an injury or death for which compensation is payable under this chapter is caused under circumstances creating a legal liability upon some

person other than the United States to pay damages therefor, the commission may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person, or the commission may require said beneficiary to prosecute said action in his own name.

If the beneficiary shall refuse to make such assignment or to prosecute said action in his own name when required by the commission, he shall not be entitled to any compensation under this chapter.

The cause of action when assigned to the United States may be prosecuted or compromised by the commission, and if the commission realizes upon such cause of action, it shall apply the money or other property so received in the following manner: After deducting the amount of any compensation already paid to the beneficiary and the expense of such realization or collection, which sum shall be placed to the credit of the employees' compensation fund, the surplus, if any, shall be paid to the beneficiary and credited upon any future payments of compensation payable to him on account of the same injury.

§27 (5 U.S.C. §777):

If an injury or death for which compensation is payable under this chapter is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensa-

tion from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

(A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund.

(B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States on account of the same injury.

§42 (as amended, 5 U.S.C. §793):

* * *

The action of the Secretary or his designees in allowing or denying any payment under this Act shall be final and conclusive for all purposes and with respect to all questions of law and fact, and not subject to review by any other official of the United States, or by any court by mandamus or otherwise . . . .